IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

H. D. MOLLOHAN and BIRDIE MOLLOHAN, husband and wife; M. S. HORNE and ED CUDAHY, doing business as EAGLE TAIL RANCH,	)	
Appellants,	)	
vs.	)	NO. 22699
WARREN J. GRAY, District Manager, Phoenix District Office, Bureau of Land Management, Department of the Interior of the United States of America, and STEWART L. UDALL, Secretary of Interior of the United States of America,	)	
Appellees.	)	

APPELLANTS' REPLY BRIEF

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In reply to the Appellees' Brief filed herein, the Appellants submit the following:

I

Appellees have in their Statement of Issues and throughout the Arguments presented relied on the wholly fallacious

premise that Appellants' allotments expired on June 30, 1961, by their own terms.

The documents to which Appellees are apparently referring are the "Grazing License or Permit Short Fort Applications" for non-use set forth at pages 22-22A and 24-24A in the Transcript of Record. These documents are administrative documents submitted annually to the Bureau of Land Management, to let the Bureau know the number of cattle to be grazed upon an allotment or, in the event that there is not sufficient feed to provide grazing for that year, then the application is for non-use of the allotment for that period of time. These documents do not in any way constitute the leases or allotments under which Federal lands are used for grazing purposes.

The Bureau of Land Management utilizes two different types of documents to

effectuate leases to the public. One type of lease is used wherein specific areas are to be leased under the Taylor Grazing Act. These leases, usually 10 years in length, are specific leases of a specific area described by Section number or part thereof, Township and Range.

A second type of lease is used when the government has large grazing areas which may include deeded lands, State lands, mining claims, etc., such as is the H. D. Mollohan allotment and the Eagle Tail Ranch allotment. This type of lease, called an allotment, is effected by an application being made and an allotment being granted to the lessee, leasing all of the area which the government is entitled to lease within a circumscribed area set forth upon an allotment map. This allotment does not in any way expire by its

own terms or otherwise, but is retained by the allotment holder until cancelled by the Bureau of Land Management.

The Appellants Eagle Tail Ranch and H. D. Mollohan, et al, hold allotments from the Bureau of Land Management and the annual permits to which the Appellees refer are merely the annual reports submitted to describe the use to be made of the allotment during the ensuing year.

Appellees have, therefore, premised their entire argument on the false premise that Appellants' leases had by their own terms expired on June 30, 1961.

An examination of the letters attempting to cancel the lands in question from Appellants' grazing allotments confirm the above matters, as do the subsequent letters of July 14, 1960. (See T.R., pp. 30, 31, 33, 35, 36, 38 and 39.) The first paragraph of the Bureau of Land Management's

letters of September 15, 1959, state as follows:

> "Reference is made to your grazing allotment in Arizona District 3 as indicated on your official allotment map dated August 31, 1959, on file in this office. * * * In view of the public withdrawal order provisions, you are hereby notified that public lands within your grazing allotment which were included within the boundaries of the Yuma Test Station are cancelled from your grazing allotment." (Emphasis added)

In the subsequent letters on July 14, the following statements appear:

> "You are hereby notified that the public lands included within the boundaries of the Yuma Test Station * * * is cancelled from your allotment and your allotment boundary revised to exclude said area." (Emphasis added)

> "As previously advised, this action is necessary as said lands are no longer under the grazing administration of the Bureau of Land Management. If and when these lands are returned to the Bureau of Land Management for grazing administration, preference for their grazing use will be granted to present allottees in accordance with existing rules and regulations."

This appeal is not, as stated by Appellees, an appeal of the refusal of the Bureau of Land Management to renew the grazing permits. This is an appeal of the cancellation of non-expiring allotments.

II

In the first paragraph of its arguments, the Appellees have stated that the Complaint seeks to compel the issuance of permits under the Taylor Grazing Act, and was properly dismissed for lack of jurisdiction. Here again, the basic premise of the Appellees' case is that the Appellants are desiring to compel the issuance of permits. This is not the case. The Appellants have properly attacked the cancellation of a portion of their allotments by the District Manager of the Bureau of Land Management. The Secretary of Interior was brought in as a necessary party defendant under an

order of the District Court. The Appellees have, in their challenge of jurisdiction, therefore proceeded on a completely fallacious set of premises which are not in any way applicable to the case at hand. None of the cases cited by the Appellees are pertinent to the question presented herein.

It should be noted that Appellees did not at any time raise the question of lack of jurisdiction under the Administrative Procedure Act in the District Court proceeding.

A. Subparagraph A of Appellees' Brief states that the basic problem involved in this appeal is the failure to renew a grazing lease upon its expiration. As stated before, Appellants' allotments had not expired and were attempted to be cancelled solely on the basis that the Bureau of Land Management no longer had any authority to administer the lands.

(See T.R., pp. 30, 31, 33, 35, 36, 38, and 39.)

B. The same set of circumstances is applicable to the argument set forth in Appellees' argument on "Mandamus Jurisdiction". In the concluding paragraph it is stated:

> "As we have just shown, there is no mandatory duty imposed by Congress on the Secretary to issue or renew Taylor Grazing permits."

Here again it is obvious that the Appellees are arguing something that it is not within the purview of this case.

C. The Appellees then proceed to argue that since the permits had expired by their own terms, the present appeal is moot. This also is a false premise, inasmuch as the allotments had not expired by their own terms and, in fact, as shown by the purported letters of cancellation (T.R., pp. 30, 31, 33, 35, 36, 38 and 39) the allotments remained in full

force and effect and, in fact, so remain to this date.

III

The Appellees in paragraph II argue as follows:

> "The short answer to this argument (Appellants' argument that no withdrawal under the statute was made) is that no grazing allotment of theirs was ever cancelled. The Mollohans held annual non-use licenses which ran from July 1, 1960, to June 30, 1961. These simply expired of their own force and were not renewed."

Here again we have the same fallacious premise relied on by Appellees.

Appellees in fact do not even attempt to refute Appellants' contention that cancellation was for the express purpose of avoiding the requirement set forth in Sections 155 through 158 of 43 U.S.C.A., which provides that any such withdrawals must be approved by Congress. While it is true that the Bureau of Land Management

might have authority to cancel a lease agreement, it was never intended that the government would act arbitrarily or capriciously in so doing. Section 315(b) of 43 U.S.C.A., which sets up the basic ground rules of grazing permits, expressly provides that upon termination, the permit holders will have a preferential right for renewal, so that the Bureau of Land Management could not arbitrarily cancel a permit lease or allotment and then arbitrarily award it to some other person. A copy of Section 315(b) is included herein for the convenience of the Court.

§ 315b. Grazing permits; fees; vested water rights; permits not to create right in land

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time, and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock pur-

poses. Such fees shall consist of a grazing fee for the use of the range, and a range-improvement fee which, when appropriated by the Congress, shall be available until expended solely for the construction, purchase, or maintenance of range improvements. Grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior

is authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further*, That nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession

and use of water for mining, agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands. June 28, 1934, c. 865, § 3, 48 Stat. 1270; Aug. 6, 1947, c. 507, § 1, 61 Stat. 790.

Historical Note

1947 Amendment. Act Aug. 6, 1947, provided for method to be used by the Secretary of the Interior in fixing the amount of grazing fees and by assessing a separate grazing fee and a range-improvement fee.

Congressional Comment: For legislative history and purpose of Act Aug. 6, 1947, see 1947 U.S.Code Cong.Service, p. 1038.

Cross References

Disposition of moneys received, see section 315i of this title.

While it is true, as stated in the Ohman v. U. S. case, 179 F.2d 738, quoted in the Appellees' Brief, that grazing permits are privileges withdrawable at any time for any use by the sovereign, without compensation, any such withdrawing of public lands must also meet the requirements of all other statutory provisions. Section 43-315(q) U.S.C.A. expressly provides for the payment of fair and reasonable damages for losses suffered by persons whose grazing permits or

licenses have been cancelled because of withdrawal of these lands for military purposes. For the convenience of the Court, this statutory section is set forth herein.

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§ 315q. Withdrawal of lands for war or national defense purposes; payment for cancellation of permits or licenses

Whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be canceled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing contained in this section shall be construed to create any liability not now existing against the United States. July 9, 1942, c. 500, 56 Stat. 654; May 28, 1948, c. 353, § 1, 62 Stat. 277.

Historical Note

Codification. Section was not enacted as a part of the Taylor Grazing Act which comprises this chapter.

1948 Amendment. Act May 28, 1948, inserted "or national defense" between "war" and "purposes" wherever appearing.

Effective Date of 1948 Amendment. Section 2 of Act May 28, 1948, provided that the amendment of this section by section 1 of Act May 28, 1948, shall be effective as of July 25, 1947.

Termination of War and Emergencies. Joint Res. July 25, 1947, c. 327, § 3, 61 Stat. 451, provided that in the interpretation of this section, the date July 25, 1947, shall be deemed to be the date of termination of any state of war theretofore declared by Congress and of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941.

Legislative History: For legislative history and purpose of Act May 28, 1948, see 1948 U.S.Code Cong.Service, p. 1614.

Cross References

Rental payments in advance, see section 315r of this title.

Notes of Decisions

Compensation, right to 2
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Public Lands ⇐50.
C.J.S. Public Lands § 73 et seq.

1. Purpose

Noncompensable hardships of the kind involved where the United States condemns land covered by grazing permits prompted Congress to amend this chapter to provide for administrative determination and payment for losses suffered from cancellation of grazing permits for war purposes. U. S. v. Cox, C.A.N.M.1951, 190 F.2d 293, certiorari denied 72 S.Ct. 107, 342 U.S. 867, 96 L.Ed. 652.

2. Compensation, right to

Holders of grazing permits in National Forest were not entitled to compensation for revocation of permits incident to taking over of National Forest by Secretary of War for military purposes, but only recourse of permittees was to apply to Secretary of War for relief under this section. Osborne v. U. S., C.C.A.Ariz.1944, 145 F.2d 892.

3. Valuation of property

Where Government condemned fee land owned by rancher and lands leased from state for war purposes but did not revoke or condemn forest grazing permit affecting public lands adjoining leased land, it was improper to value separately the permit land and add value to estimated value of the fee and leased land in arriving at just compensation for that which was taken even though it was proper to take available and accessible permit lands into consideration in arriving at compensation for fee lands taken. U. S. v. Jaramillo, C.A.N.M.1951, 190 F.2d 300.

In judicial determination of fair value as just compensation for land taken, highest and most profitable use for which it is reasonably adaptable may be considered, not necessarily as measure of value, but to full extent that prospect of demand for such use affects market value while property is privately held. Id.

Where federal government condemned fee owned by rancher and land leased from state but did not condemn forest grazing land of public domain adjoining leased land, and grazing permit was not revoked by taking and forest service issued amended permit, jury could consider in determining value of fee taken the availability and accessibility of permit land as an appurtenant element of value for ranching purposes provided consideration was also given to possibility that grazing permits could be withdrawn or cancelled by the Government at any time without constitutional obligation to pay compensation therefor. Id.

All rights, easements and privileges appurtenant thereto should be considered in estimating fair value or compensation to be paid for land taken by the Government, taking into account also the possibility of their being discontinued without resulting obligation. Id.

Where federal Government condemned cattle ranches consisting of land owned in fee by ranchers, land leased from state, and public domain on which ranchers held permits granted exclusive or preferential right to graze stipulated number of cattle, but permits were withdrawn or cancelled coincidental with taking, accessibility and availability of land covered by grazing permits could not be taken into consideration as element of value in arriving at value of fee land taken. U. S. v. Cox, C.A.N.M.1951, 190 F.2d 293, certiorari denied 72 S.Ct. 107, 342 U.S. 867, 96 L.Ed. 652.

Where cattle ranches consisting of land owned in fee by ranchers, land leased from state, and public domain on which ranchers held permits granting exclusive or preferential right to graze stipulated number of cattle were condemned by the federal Government, fair value of permit land as base land for cattle ranch in connection with grazing permit land was competent evidence of just compensation only if permit lands were accessible and available for that purpose. Id.

4. Permits or licenses

Under this chapter, government, in withdrawing the federal domain, can cancel existing permits, paying for the losses suffered, or in lieu thereof can pay rentals, and in effect lease back the government's own permit. McDonald v. McDonald, 1956, 302 P.2d 726, 61 N.M. 458.

5. Rentals

In action to determine how rentals paid by government under lease and suspension agreement for use of ranch as bombing range should be divided between brother who owned two-thirds of ranch and brother who owned one-third where brothers used premises equally and conducted cattle business on fifty-fifty basis, evidence did not support inference that nothing except annual carrying capacity set by Taylor grazing permit was used in arriving at extent of usage and conclusion that brother who owned one-third interest was entitled to share equally in rentals. McDonald v. McDonald, 1956, 302 P.2d 726, 61 N.M. 458.

In action to determine how rentals paid by government under lease and suspension agreement for use of ranch as bombing range should be divided between brothers who owned ranch and had each received a part of moneys in dispute, court erred in failing to order an accounting. Id.

In addition, the Secretary of the Army has failed to comply with Section 10-2662, U.S.C.A. which requires that the Secretary of a military department must come to an agreement with the Committee on Armed Services of the Senate and House before lands may be transferred from the Bureau of Land Management to the Department of Army. A copy of this provision is also included for the convenience of the Court.

§ 2662. Real property transactions: agreement with Armed Services Committees; reports

(a) The Secretary of a military department, or his designee, must come to an agreement with the Committees on Armed Services of the Senate and the House of Representatives before entering into any of the following transactions by or for the use of that department:

(1) An acquisition of fee title to any real property, if the estimated price is more than $25,000.

(2) A lease of any real property to the United States, if the estimated annual rental is more than $25,000.

(3) A lease of real property owned by the United States, if the estimated annual rental is more than $25,000.

(4) A transfer of real property owned by the United States to another Federal agency or another military department or to a State, if the estimated value is more than $25,000.

(5) A report of excess real property owned by the United States to a disposal agency, if the estimated value is more than $25,000.

If a transaction covered by clause (1) or (2) is part of a project, the agreement must be based on the general plan for that project, including an estimate of the total cost of the lands to be acquired or leases to be made.

(b) The Secretary of each military department shall report quarterly to the Committees on Armed Services of the Senate and the House of Representatives on transactions described in subsection (a) that involve an estimated value of more than $5,000 but not more than $25,000.

(c) This section applies only to real property in the United States, Alaska, Hawaii, and Puerto Rico. It does not apply to real property for river and harbor projects or flood-control projects, or to leases of Government-owned real property for agricultural or grazing purposes.

(d) A statement in an instrument of conveyance, including a lease, that the requirements of this section have been met, or that the conveyance is not subject to this section, is conclusive. Aug. 10, 1956, c. 1041, 70A Stat. 147.

Historical and Revision Notes

Revised Section	Source (U. S. Code)
2662 (a)	40:551
2662 (b)	40:552
2662 (c)	40:553
2662 (d)	40:554

Source (Statutes at Large)

Sept. 28, 1951, ch. 434, §§ 601-604, 65 Stat. 365, 366.

Explanatory Notes

In subsection (a), the words "must come to an agreement . . . before entering into any of the following transactions by or for the use of that department:" are substituted for the words "shall come into agreement . . . with respect to those real-estate actions by or for the use of the military departments . . . that are described in subsection (a)-(c) of this section, and in the manner therein described". The last sentence is substituted for the last sentence of 40:551 (a) and 40:551(b).

In subsection (a) (4), the words "or another military department" are substituted for the words "including transfers between the military departments". The words "under the jurisdiction of the military departments" are omitted as surplusage.

In subsection (b), the words "more than $5,000 but not more than $25,000" are substituted for the words "between $5,000 and $25,000". The words "shall report" are substituted for the words "will, in addition, furnish . . . reports".

In subsection (c), the words "the United States, Alaska, Hawaii" are substituted for the words "the continental United States, the Territory of Alaska, the Territory of Hawaii", since, as defined in section 101(1) of this title, "United States" includes the States and the District of Columbia; and "Territories" includes Alaska and Hawaii.

In subsection (d), the words "A statement . . . that the requirements of this section have been met" are substituted for the words "A recital of compliance with this chapter . . . to the effect that the requirements of this chapter have been complied with". The words "in the alternative", "or lease", and "evidence thereof" are omitted as surplusage.

Notes of Decisions

1. Withdrawal of offer

The Secretary of War having determined that a Reservation was no longer needed for military purposes, and having thereupon had the property appraised and a notice given to the State and County of their option to purchase under the statute might have reconsidered his conclusion as to the need of the property for military purposes and could have withdrawn the offer before the offer had been accepted or any action taken by the State authorities in reliance on it. 1928, 35 Op.Atty.Gen. 481.

IV

Under all of the facts of this case it is apparent that the enactment of Section 43 U.S.C.A. 155 through 158 concerning withdrawals of public lands was for the express purpose of protecting the lessees of public lands under exactly the circumstances of this case. Appellees have in their final sentence in the Brief stated that "The Mollohans have received every consideration to which they were entitled." Quite to the contrary, the Appellants have not received any of the considerations to which they are entitled. The Appellants desire only to be treated legally and equitably in conformity with the applicable laws of the United States.

The military is entitled to withdraw public lands only in conformity with existing laws, and Appellants are entitled to due process of law which includes the statutory safeguards which Appellants have prayed for herein.

Under all of the foregoing circumstances, the decision of the District Court should be reversed and the Appellants' Motion for Summary Judgment granted.

Respectfully submitted this 25th day of September, 1968.

TANNER, JARVIS & OWENS

By Wallace O. Tanner
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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these Rules.

TANNER, JARVIS & OWENS

By Wallace O. Tanner

Wallace O. Tanner

This will certify that three copies of the Appellants' Reply Brief were served upon the United States Attorney at the Federal Building, Phoenix, Arizona, as attorney for Appellees, and three copies were mailed to the Assistant Attorney General, Land and Natural Resources Division, Attention: Jacques B. Gelin, Clyde O. Martz, and Raymond N. Zagone,

Attorneys in the Department of Justice, Washington, D. C., 20530, this 25th day of September, 1968.

Wallace O. Tanner